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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1025

STATE OF MONTANA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Of Counsel.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Statement of case	1
Reasons relied on for the allowance of the writ	9
Prayer for writ	10
Brief in support of petition for certiorari	11
Opinions of courts below	11
Jurisdiction	12
Statement of the case	12
Specification of Errors	12
Argument	13
Summary of argument	13
Point A	13
Point B	15
Point C	16
Conclusion	16
Appendix	18

Table of Cases Cited.

Beecher v. *Wetherby*, 95 U. S. 517, 24 L. Ed. 440	15
Bucher v. *Cheshire Railroad Co.*, 125 U. S. 555, 584	15
Erie Railroad Co. v. *Tompkins*, 304 U. S. 64	15
Forsyth v. *Hammond*, 166 U. S. 506, 518	15
Jones v. *Western Union Telegraph Co.*, 18 F. (2d) 650	15
Moody v. *Toole County Irrigation District*, 125 F. (2d) 498	15
Morrison v. *United States*, 212 U. S. 29, 35	15
Schodde v. *Twin Falls Water Co.*, 224 U. S. 107	15
State ex rel. Galen v. *District Court*, 42 Mont. 105, 113, 112 Pac. 706	8, 15, 16
Town of New Bedford v. *United States*, 23 F. (2d) 453, 455	13

Page

United States v. *Certain Lands in the Town of Newcastle*, 165 Fed. 783, 785 ..... 13, 14

CONSTITUTIONAL PROVISIONS CITED.

Montana Constitution:

Article XVII, Section 1 ..... 3, 20

Ordinance Appended to Constitution:

Ordinance 1, Section 7 21

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Statement of Case.

This is an action at law brought by the United States, respondent herein, in the District Court of the United States for the District of Montana, against the State of Montana, appellant herein, and various individual property

owners for the purpose of condemning certain described parcels of land in Beaverhead County, Montana, for the purposes, as alleged in the complaint, of (a) prevention of soil erosion, (b) sanctuary for the propogation of migratory water-fowl by providing nesting, resting and feeding grounds in effectuation of the treaty between the United States and Great Britain, August 16, 1916 (36 Stat. 1702), (c) refuge for other forms of wild life common to this area, and (d) relief of unemployment by the construction of improvements and development work necessary for the use of the land in the manner described in said complaint (R. 4, 5).

The plaintiff below based its authority to bring the action upon the following:

1. Title II, National Industrial Recovery Act (48 Stat. 200) as extended by the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) (R. 4, 8, 9).
2. Act of August 1, 1888 (25 Stat. 357) (R. 9).

Insofar as the State of Montana, defendant below, is concerned, part of the land sought to be condemned as property of the State comprised land embraced within Sections 16 and 36 in certain townships R. 10, 11) which were grants made the State under its Enabling Act of February 12, 1889 (25 Stat. 676) (R. 29, 30).

The complaint alleged, insofar as material here, that money had been appropriated to pay for said lands and was available when needed; that the property had not theretofore been appropriated to any public use; that the use to which the lands are to be applied is a use authorized by law; and that the taking is necessary to such use (R. 17). These allegations, with exception that the lands had not been appropriated for a public use, were by answer denied (R. 26).

By separate defense in its Answer, the State alleged its sovereignty, and upon information and belief alleged that the sole purpose for which the lands sought to be condemned was to provide a reservation or sanctuary for migratory birds to be used solely for the propogation and protection of such migratory birds as provided by Act of Congress, February 18, 1929 (45 Stat. 1222), as amended by Act of Congress, June 15, 1935 (49 Stat. 381) known as the Migratory Bird Conservation Act; that under Section 7 of said Act, title to such land could not be taken without the consent of the State (R. 27), and that the State had not consented thereto (R. 28); that plaintiff seeks by said action to acquire the lands by and through the Administrator of the Resettlement Administration for the purpose of delivering title thereto and the possession thereof to the Secretary of Agriculture or the Bureau of Biological Survey, for and on behalf of the United States, in order that said lands may be used solely as a sanctuary for migratory birds, and that such acquisition is unauthorized and contrary to the laws and policy of the United States (R. 29). The Answer further alleged that the lands were highly productive meadow, grazing and agriculture lands and have been used as such for many years; that the lands are low lying pasture lands capable of producing hay in satisfactory paying quantity and grazing livestock; that they are not sub-marginal of a class or character intended by any Act of Congress or of the President should be withdrawn from private or state ownership and acquired by the United States (R. 29).

The Answer further alleged that the lands in question were granted by the United States to the State of Montana under its Enabling Act, and accepted by the State with the provision that such lands should be disposed of by the State only at public sale after advertising; that by Secton

1 of Article XVII of the State Constitution, it was provided:

> "* * * nor shall any lands which the state holds by grant from the United States (in any case in wwhich the manner of disposal and minimum price are so prescribed) be disposed of, except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States."

That the United States or the State of Montana has not given consent to the disposal of said lands in any other manner (R. 30).

By Reply, plaintiff below denied, among other things, that the sole purpose of the acquisition of the lands was to provide a reservation or sanctuary for migratory birds to be used solely for the propagation and protection of such birds as provided by the Migratory Bird Conservation Act; that the consent of the State was necessary (R. 33); denies that the acquisition is for a sanctuary for migratory birds; that the United States is not vested with authority to acquire the lands for the purposes set forth in the complaint; alleges that the provisions of the Enabling Act, and amendatory act have no application to the United States and do not limit its right of eminent domain, but regulate transactions with reference to school lands between the State and private individuals (R. 34, 35).

A Declaration of Taking was filed (R. 35 to 50), Motion for Entry of Judgment was filed (R. 50), and thereafter the matter came on for hearing before the Court without a jury (R. 51). The State of Montana being the only defendant appearing, testimony was introduced (R. 52), at the conclusion of which the defendant moved to overrule the Motion of plaintiff for Entry of Judgment (R. 52), and is as follows:

> "Thereupon the defendant State of Montana moved the court to overrule the motion of the plaintiff herein

for the reason that the lands of the State of Montana sought to be condemned are not subject to condemnation or other disposal, except in accordance with the enabling Act and the Constitution of the State of Montana; second, that the State of Montana has not consented to the acquisition of any of the lands described in the said complaint, by the United States; third, that the land described in the complaint is not required for public use; that the plaintiff has not shown this court that the land described in the complaint is necessary for the use of the United States as is contemplated by either the statutes of the United States or the statutes of the State of Montana; that plaintiff's evidence does not entitle it to the relief sought or to enable this court to sustain plaintiff's motion herein; and that this court is without jurisdiction to grant the relief requested in said motion and complaint."

The matter was thereupon submitted to the Court, briefs were filed by both parties, and thereafter the Court made its order and decision (R. 53).

The order and decision of the trial Court, insofar as pertinent to the questions presented here, is as follows (R. 56):

"After mature consideration, I feel that on the present state of the record, but two of the contentions of the State of Montana can finally be disposed of. These contentions are:

"1. The lands of the State of Montana sought to be condemned are not subject to condemnation or disposal except in accordance with the Enabling Act and the Constitution of the State of Montana; and

"2. This Court is without jurisdiction to grant the relief requested in said motion and complaint (R. 48).

"In argument the State contends that this Court is without jurisdiction to grant the relief requested in said motion and complaint for the reason that the Supreme Court of the United States has exclusive

jurisdiction of this proceeding insofar as the State of Montana is concerned.

"I am of the opinion and hold that this contention is not well grounded.

"Act of August 1, 1888, C. 728, Sec. 1, 25 Stat. 357; Sec. 257, Title 40 U. S. C. A. U. S. *v.* California, 297, U. S. 175, 187-189;

U. S. *v.* 40 acres of land, District Court of the United States, District of Idaho, 24 Fed. Supp. 390.

"I am of the opinion and hold that the lands of the State of Montana sought to be condemned are not subject to condemnation or disposal except in accordance with the Enabling Act and the Constitution of the State of Montana.

"It was so held in the case of State ex rel. Galen *v.* District Court, et al., 42 Montana 105, 113-117, and the decision in that case is controlling here.

"Erie Railroad Company *v.* Tompkins, 304 U. S. 64; and Moody *v.* Toole County Irrigation District, decided by the Circuit Court of Appeals, Ninth Circuit, January 28, 1942; 125 F. (2) 498:

"It follows that the motion of the State of Montana should be and it is hereby granted."

Formal order dismissing the action as to the State of Montana and insofar as it relates to lands belonging to the State of Montana, was duly entered and filed (R. 53, 57).

Due Notice of Appeal was served and filed by plaintiff below, and thereafter and in due course Concise Statement of Points on which appellant intends to rely on appeal was served and filed, and is as follows:

"1. The trial court erred in dismissing this action as to the State of Montana and insofar as it relates to lands belonging to the State of Montana.

"2. The trial court erred in holding that the lands described in the complaint are not subject to condemnation or disposal except in accordance with the Enabling Act and the Constitution of the State of Montana.

"3. The trial court erred in granting the motion of the State of Montana to overrule the motion of the United States that the court enter an order adjudicating and determining that the lands described in plaintiff's complaint are required for the public use or uses therein alleged, and to enter a judgment on the declaration of taking filed by the plaintiff in this cause, letting plaintiff in possession of the lands and fixing the terms and conditions upon which plaintiff may enter into possession of the same.

"4. The trial court erred in holding that the case of State ex rel. Galen *v.* District Court, et al., 42 Mont. 105, 112 Pac. 706 (1910) is controlling of the issues in the instant case.

"5. The trial court erred in not entering judgment on the declaration of taking filed by the plaintiff in this cause, letting plaintiff in possession of the lands and fixing the terms and conditions upon which plaintiff may enter into possession of the same."

Defendant below in due course declined to offer any additional portions of the record on appeal (R. 67, 68), and thereafter Transcript of Record on Appeal was duly filed and served (R. 68, 69). Briefs were thereafter duly filed in the Circuit Court and the cause was argued and submitted (R. 75).

The main questions involved in the appellate court, and the contentions advanced by each party are set forth in the briefs filed in that court, but in the record appear in the Statement of Points relied on by the appellant below (R. 62), and the Motion of Defendant below to overrule the Motion of Plaintiff for Entry of Judgment (R. 52), and the same having hereinabove been set forth are for the sake of brevity hereby adopted and made a part of this petition.

Thereafter, and on March 6, 1943, the Circuit Court of Appeals rendered its opinion, and ordered the same, to-

gether with Decree to be filed (R. 75), and the same was filed in said Circuit Court on said date.

On the questions here presented and urged as error, the Circuit Court of Appeals held:

1. The decision of the Montana Supreme Court in the case of *State ex rel. Galen* v. *District Court,* 42 Mont. 105, 112 Pac. 706 (R. 77), is not binding on the Federal Court, for

(a) The decision is an interpretation of a federal statute (R. 79).

(b) The decision does not rule the case at bar because the state court did not decide that the enabling act prevented the United States from condemning school lands (R. 79).

2. Since the language of the Enabling Act does not clearly and specifically prohibit the United States from condemning the lands, the Court should not extend the prohibition to the United States. Citing, *United States* v. *Stevenson,* 215 U. S. 190, 197 (R. 79).

3. As thus construed, the statute is no obstacle to the instant proceedings. Citing, *United States* v. *2715.98 Acres of Land,* More or Less, 44 F. Supp. 683, 684, *U. S.* v. *Forty Acres,* More or Less, of Land, Etc., 24 F. Supp. 390, 391.

4. State ownership of lands does not prevent condemnation. Citing *Oklahoma* v. *Atkinson Co.* 313, U. S. 508, 534 (R. 79).

5. Since the complaint states the purposes of acquisition to be at least three, (a) prevention of soil erosion, (b) propogation and protection of migratory wild life, and (c) relief of unemployment, which reasons are repeated in the declaration of taking, the court cannot inquire into the intentions of the Administrator and find the purposes to be not three but one. Citing *City of Oakland* v. *United States,* 124 F. (2d) 959, 964 (R. 79, 80).

By its Decree the Circuit Court of Appeals reversed the Order of the District Court dismissing the action as against the State of Montana, and insofar as it relates to lands belonging to the State of Montana.

II.

Reasons Relied On for the Allowance of the Writ.

The decision of the Circuit Court of Appeals in holding that:

> (a) The United States under authority of Title II, Sections 202-203 of the National Industrial Recovery Act, (48 Stat. 200) (R. 3), as extended by the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) (R. 4), and under the Act of August 1, 1888 (25 Stat. 357) (R. 9), may condemn state owned school lands granted the State of Montana under the Enabling Act, approved February 22, 1889 (25 Stat. 676) and particularly Section 11 of said Act as amended by Act of Congress approved May 7, 1932 (47 Stat. 150) and accepted by the State of Montana by Chapter 84, Laws of Montana, 1933, and contrary to Section 1 of Article XVII of the Constitution of the State of Montana.
>
> (b) The decision of the Supreme Court of the State of Montana in the case of *State ex rel. Galen* v. *District Court,* 42 Mont. 105, 112 Pac. 706, is not binding on the federal courts.

(1) involves important questions of federal law, which have not been, but should be, settled by this Court, in this, that therein are involved important questions affecting state rights, applicable to every land grant state in the Union, and the public interest will be promoted by a prompt settlement in this Court of the questions involved; (2) is in conflict with a decision of the highest Court of the State of Montana, to-wit, the Supreme Court.

Prayer for Writ.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Ninth Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No. 10210, United States of America, Appellant, *v.* State of Montana, et al., Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the decree herein of said Circuit Court be reversed by this Court, and for such further relief as may seem proper.

Dated May 7th, 1943.

R. V. BOTTOMLY,
Attorney General of the
State of Montana.
Attorney for Petitioner.

FRED LAY,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1025

STATE OF MONTANA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Opinions of Courts Below.

Condemnation by the United States against the State of Montana, and certain individuals, to acquire certain tracts of state owned school land in the State of Montana. The decision of the United States District Court for the District of Montana, dated March 31, 1942, and its order entered April 10, 1942, are not yet officially reported but appear at pages 53 and 58 respectively of the record.

The opinion of the Circuit Court of Appeals, Ninth Circuit, dated March 6, 1943, is not yet officially reported but appears in the printed record at page 76.

II.

Jurisdiction.

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A., Section 347.

2. The decree to be reviewed was entered March 6, 1943 (R. 81).

3. The following questions are raised in this Court on the record:

(a) May the United States in a suit against the State, under authority of Title II, Sections 202, 203 (48 Stat. 200), as extended by the Emergency Relief Appropriation Act (49 Stat. 115), and under the Act of August 1, 1888 (25 Stat. 357), condemn state owned school lands granted by the federal government under the Enabling Act (25 Stat. 676)?

(b) Is the decision of the Supreme Court of the State of Montana in the case of State ex rel. Galen *v.* District Court, 42 Mont. 105, 112 Pac. 706, interpreting the Enabling Act, the State Constitution and the Laws of the State, binding upon the Federal Court in the instant case?

III.

Statement of the Case.

The essential facts of the case are fully stated in the accompanying petition for certiorari, and in the interest of brevity are not repeated here.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the lands in question are subject to condemnation under the pro-

visions of the Industrial Recovery Act (48 Stat. 200) and the Act of August 1, 1888 (25 Stat. 357).

2. The Circuit Court of Appeals erred in holding that the decision of the Supreme Court of the State of Montana (the highest court in the State) is not controlling in the instant case.

3. The Circuit Court of Appeals erred in reversing the order of the United States District Court dismissing the action as to the State of Montana and insofar as it relates to school lands belonging to the State of Montana.

V.

ARGUMENT.

Summary of Argument.

Point A. The Circuit Court should have held that in view of the pleadings in this case which predicated authority for condemnation on the National Industrial Recovery Act, and the Emergency Relief Appropriation Act of 1935 (49 Stat. 115), and the Act of August 1, 1888 (25 Stat. 357), state owned school lands could not be acquired by the federal government without the consent of the State.

While the power of eminent domain is inherent in the federal government as a right of sovereignty, such power does not exist in any executive office or department of government except through authority expressly given by Congress.

United States v. *Certain Lands in the Town of Newcastle*, 165 Fed. 783, 785.

The National Industrial Recovery Act does not authorize condemnation of lands for the purpose of providing a sanctuary for propagation and protection of migratory water fowl.

Section 202 of the Act (set out in the Appendix) authorizes the administrator, under direction of the President, to prepare a comprehensive program of public works, and specifically sets out the character of such works. The project for which the lands here in question are sought to be condemned, is not one therein mentioned.

Section 203 (a) of the Act (set out in Appendix) authorizes the President, through the administrator or through such other agencies as he may designate or create "* * * (3) to acquire by purchase, or by exercise of power of eminent domain, any real or personal property in connection with the construction of any such project * * *." The words "such projects" refer to those projects authorized by Section 202, which, as we have heretofore pointed out, does not include the project under which the lands here in question are sought to be condemned.

The Act of August 1, 1888, vests no authority in any executive office to procure real estate by condemnation, but vests jurisdiction in federal courts, and establishes methods of procedure, wherever authority has been or might thereafter be given, referring those courts to some other law for such authorization.

United States v. *Certain Lands in the Town of Newcastle*, 165 Fed. 783, 785;

Town of New Bedford v. *United States*, 23 F. (2d) 453 at 455.

In its opinion (R. 78) the Circuit Court says that the Act authorizes the acquisition of "any" real property in connection with the construction of any project in the program of public works prepared by the administrator. We submit that the Court was in error in its interpertation of the Act, for, as pointed out above, the Act only authorizes condemnation for the character of projects mentioned in Section 202.

And finally on this point, we submit that the weight of authority on the status of granted school lands under an Enabling Act is to the effect that such grants under a solemn pact between the federal government and the state, being an unalterable condition of admission, are appropriations to the state which can not be divested.

Beecher v. *Witherby*, 95 U. S. 517, 24 L. Ed. 440;
Morrison v. *United States*, 212 U. S. 29, 35.

Point B. The Circuit Court should have held, as did the District Court, that the decision in the case of *State ex rel. Galen* v. *District Court, et al.*, 42 Mont. 105, 113, 117, 112 Pac. 706, is controlling on the federal courts (R. 57).

The Circuit Court in its opinion (R. 79) says that the decision in the Galen case is an interpretation of the federal statute (the Enabling Act), and for such reason is not binding on the federal courts. We agree with the principle of law stated, but submit that the decision was also an interpretation of the State Constitution, which is binding upon federal courts. The Court, in the Galen case, based its opinion not alone upon the provisions of the Enabling Act, but also upon the provisions of Section 1 of Article XVII, and upon Section 7 of Ordinance No. 1, appended to the State Constitution. (See page 113 of Montana Citation—42 Montana Reports.)

Erie Railroad Company v. *Tompkins*, 304 U. S. 64;
Moody v. *Toole County Irrigation District*, 125 F. (2d) 498;
Schodde v. *Twin Falls Water Co.*, 224 U. S. 107.

The construction by the Courts of a state of its Constitution and Statutes, is, as a general rule, binding on the Federal Courts.

Bucher v. *Cheshire Railroad Co.*, 125 U. S. 555, 584;
Forsyth v. *Hammond*, 166 U. S. 506, 518;
Jones v. *Western Union Telegraph Co.*, 18 F. (2d) 650.

Point C. The Circuit Court of Appeals should have affirmed the order of the Federal District Court, which held that under the decision of the highest Court of the State, the Supreme Court, in the case of *State ex rel. Galen* v. *District Court*, 42 Mont. 105, 112 Pac. 706, under the Enabling Act and the State Constitution, state owned school lands are not subject to condemnation.

The Enabling Act and the applicable provisions of the State Constitution should be read together.

This rule, the Supreme Court in the case of *Galen* v. *District Court*, 42 Mont. 105, 112 Pac. 706, followed, and its decision is binding upon the federal courts in the instant case.

The question involved is one of great importance, which, so far as our research has determined, has not been decided by this Court. The principles involved affect every state in the Union having lands under grant from the federal government for support of their schools. The question should therefore be passed on by the highest court of the United States.

VI.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that errors herein pointed out may be corrected; that the law may be properly and authoritatively defined, and that the Decree of the United States Circuit Court of Appeals of the Ninth Circuit should be reversed and the Order of the United States District Court for the District of Montana be affirmed, in order that justice may be done to petitioner; and that to such an end a writ of certiorari should be granted and this Court should review the

decision of the United States Circuit Court of Appeals of the Ninth Circuit and finally reverse it.

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CLARENCE HANLEY,
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APPENDIX.

Section 1 of the Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. Sec. 257:

That in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States circuit or district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice.

Sections 202 and 203 of Title II of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 200:

Sec. 202. The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: * * * (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, and construction of river and harbor improvements and flood control * * * (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; * * *

Sec. 203. (a) With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or through such other agencies

as he may designate or create, (1) to construct, finance, or aid in the construction or financing *of any public-works project included in the program prepared pursuant to section 202;* * * * (3) to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property *in connection with the construction of any such project,* * * * (Emphasis ours.)

Section 10 of the Montana Enabling Act of February 22, 1889, 25 Stat. 676:

Sec. 10. That upon the admission of each of said States into the Union sec-ions numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools * * *

Section 11 of the Enabling Act of February 22, 1889, 25 Stat. 676, as amended by the Act of May 7, 1932, 47 Stat. 150:

* * * That section 11 of the Act approved February 22, 1889 (25 Stat. 676), be, and the same is hereby, amended to read as follows:

"That all lands granted by this Act shall be disposed of only at public sale after advertising—tillable lands capable of producing agricultural crops for not less than $10 per acre and lands principally valuable for grazing purposes for not less than $5 per acre. Any of the said lands may be exchanged for other lands, public or private, of equal value and as near as may be of equal area, but if any of the said lands are exchanged with the United States such exchange shall be limited to surveyed, nonmineral, unreserved public lands of the United States within the State.

"The said lands may be leased under such regulations as the legislature may prescribe; but leases for grazing and agricultural purposes shall not be for a term longer than

five years; mineral leases, including leases for exploration for oil and gas and the extraction thereof, for a term not longer than twenty years; and leases for development of hydroelectric power for a term of not longer than fifty years.

"The State may also, upon such terms as it may prescribe, grant such easements or rights in any of the lands granted by this Act, as may be acquired in privately owned lands through proceedings in eminent domain: *Provided, however,* That none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the State.

"With the exception of the lands granted for public buildings, the proceeds from the sale and other permanent disposition of any of the said lands and from every part thereof, shall constitute permanent funds for the support and maintenance of the public schools and the various State institutions for which the lands have been granted. Rentals on leased lands, interest on deferred payments on lands sold, interest on funds arising from these lands, and all other actual income, shall be available for the maintenance and support of such schools and institutions. Any State may, however, in its discretion, add a portion of the annual income to the permanent funds.

"The lands hereby granted shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States whether surveyed or unsurveyed, but shall be reserved for the purposes for which they have been granted."

Sec. 2. Anything in the said Act approved February 22, 1889, inconsistent with the provisions of this Act is hereby repealed.

Section 1 of Article XVII, Montana State Constitution:

"All lands of the state that have been, or that may hereafter be granted to the State by congress, and all lands acquired by gift or grant or devise, from any person or cor-

poration, shall be public lands of the state, and shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised; and none of such land, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of, except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States. * * *''

Section Seventh, Ordinance 1, Appended to the Constitution of the State of Montana.

"The State hereby accepts the several grants of land from the United States to the state of Montana, mentioned in an act of Congress, entitled 'An act to provide for the division of Dakota into two states, and to enable the people of North Dakota, South Dakota, Montana, and Washington, to form constitutions and state governments, and to be admitted into the Union on an equal footing with the original states, and to make donations of public lands to such states.' Approved February 22, 1889, upon the terms and conditions therein provided."

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	6
Conclusion	10
Appendix	11

CITATIONS

Cases:	
Borax Consolidated Ltd. v. *Los Angeles*, 296 U. S. 10	9
Dubuque & Pacific R. Co. v. *Litchfield*, 23 How. 66	9
Louisiana Ry. & Nav. Co. v. *New Orleans*, 235 U. S. 164	9
Oakland v. *United States*, 124 F. (2d) 959, certiorari denied, 316 U. S. 679	7
Oklahoma v. *Guy F. Atkinson Company*, 313 U. S. 508	8
Old Dominion Co. v. *United States*, 269 U. S. 55	7
State ex rel. Galen v. *District Court*, 42 Mont. 105	5, 6, 8
United States v. *243.22 Acres of Land*, 129 F. (2d) 678, certiorari denied *sub nom. Lambert* v. *United States*, 317 U. S. 698	7, 8
United States v. *2715.98 Acres of Land, More or Less*, 44F. Supp. 683	9
United States v. *2902 Acres of Land, More or Less*, 11 Law Week 2750, decided April 9, 1943	9
United States v. *Forty Acres, More or Less of Land, Etc.*, 24 F. Supp. 390	10
United States v. *Stevenson*, 215 U. S. 190	9
Water Co. v. *Knoxville*, 200 U. S. 22	9
Statutes:	
Act of March 3, 1875, sec. 14, 18 Stat. 474	10
Act of August 1, 1888, 25 Stat. 357 (40 U. S. C. sec. 257)	6, 11
Act of February 22, 1889, 25 Stat. 676 (Montana Enabling Act):	
sec. 10	4, 13
sec. 11 and as amended by Act of May 7, 1932, 47 Stat. 150	4, 9, 10, 13
Act of July 3, 1890, sec. 5, 26 Stat. 215	10
Act of July 10, 1890, sec. 5, 26 Stat. 222	10
Act of June 20, 1910, sec. 10, 36 Stat. 557	10
Act of June 16, 1933, Title II, 48 Stat. 200 (National Industrial Recovery Act):	
sec. 202	6, 11
sec. 203	7, 12
Emergency Relief Appropriation Act of 1935, 49 Stat. 115	6

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1025

STATE OF MONTANA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 76–81) is reported in 134 F. (2d) 194.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered March 6, 1943 (R. 81–82). The petition for a writ of certiorari was filed May 13, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether lands granted by the United States to a state to be used for school purposes and not to be disposed of except at public sale are subject, under the general condemnation Act of August 1, 1888, and Title II of the National Industrial Recovery Act of June 16, 1933, to condemnation by the United States for prevention of soil erosion, relief of unemployment, and protection of migratory waterfowl and other forms of wildlife.

STATUTES INVOLVED

Section 1 of the Act of August 1, 1888, 25 Stat. 357 (40 U. S. C. sec. 257); Sections 202 and 203 of Title II of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 200; and Sections 10 and 11 of the Montana Enabling Act of February 22, 1889, 25 Stat. 676, so far as pertinent, are set out in the Appendix, *infra,* pp. 11–14.

STATEMENT

The judgment sought to be reviewed (R. 81–82) reversed a judgment of the district court (R. 58–59) dismissing the petition filed by the United States to condemn certain land owned by the State of Montana. The material facts are not disputed and may be summarized as follows:

The United States on January 19, 1938, filed its complaint in condemnation in the federal district court to acquire 3601.51 acres of land which were owned by the State of Montana (R. 3–22).

The complaint alleged that the land was needed in connection with the Red Rock Project, one of the undertakings included in the Land Use Program of the Federal Emergency Relief Administration (R. 4).[1] The purposes of this project were stated to be (R. 4–5):

> Prevention of soil erosion; sanctuary for the propagation and protection of migratory waterfowl by providing nesting, resting, and feeding grounds in effectuation of the treaty between the United States and Great Britain, August 16, 1916 (39 Stat. 1702); refuge for other forms of wild life common to this area; and relief of unemployment by the construction of improvements and developmental work necessary for the use of the land in the manner herein described.

The complaint alleged that by written options the State of Montana agreed to sell the lands in question to the United States and that the options were exercised by the Administrator of the Resettlement Administration, to whom had been transferred the powers and duties of the Federal Emergency Relief Administrator with respect to this project (R. 5–8). The options provided that title could be acquired by judicial procedure (R. 6–7). The complaint then set forth that the Ad-

[1] At the time of the filing of this complaint, the Government had already acquired 15,801 acres of privately owned land for the Red Rock Project at a cost of $285,000, and this proceeding was instituted to acquire interspersed land owned by the State of Montana.

ministrator had determined that it was necessary and advantageous that the United States acquire title in fee simple to the described lands by condemnation proceedings (R. 8–9), and judgment was asked condemning the land and awarding just compensation to those entitled (R. 18–20).

The State of Montana answered the complaint, admitting that the options were executed but denying their validity (R. 25), denying that the use to which the lands were to be applied was a public use (R. 26), and alleging that the lands sought to be condemned were "school lands" and could not be disposed of except at public sale (R. 29–31).[2]

A declaration of taking[3] was subsequently filed by the United States, $18,327.55 was deposited as estimated compensation in order to acquire the immediate use of and title to the land here involved (R. 35–44), and a motion for judgment on the declaration of taking was filed

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[2] Upon her admission into the Union, sections numbered sixteen and thirty-six, or other lands equivalent thereto, were granted to Montana "for the support of common schools." Act of February 22, 1889, sec. 10, 25 Stat. 676, 679. The involved lands fall in this classification (R. 9–11). By the terms of the grant those lands were to "be disposed of only at public sale" and in accordance with other prescribed conditions. Act of February 22, 1889, sec. 11, 25 Stat. 676, 679–680, and amendatory Act of May 7, 1932, 47 Stat. 150. The relevant parts of these statutes appear in the Appendix, *infra*, pp. 12–14.

[3] The purposes of the acquisition as stated in the complaint were repeated in the declaration of taking.

(R. 50). The state resisted this motion on the following grounds (R. 52–53):

> 1. That the Supreme Court [of the United States] alone has jurisdiction of condemnation proceedings brought to acquire state-owned lands.
>
> 2. That the lands here involved being school lands are not subject to condemnation.
>
> 3. That the lands involved are not being acquired for a public use.
>
> 4. That it is not necessary that these lands be taken.
>
> 5. That the State has not consented to the acquisition of these lands for the purposes stated in the complaint.

The district court was of the opinion that on the present state of the record only the first and second contentions could be finally disposed of (R. 56). It held the first contention not well-founded but sustained the second, being of the opinion that "school lands" could not be disposed of except in accordance with the Montana Enabling Act (Appendix, *infra,* pp. 12–14), which prohibited the state from disposing of such lands except at public sale after advertising (R. 56–57). As supporting authority it relied on the case of *State ex rel. Galen* v. *District Court,* 42 Mont. 105 (1910). It accordingly dismissed the action (R. 58–59).

The United States appealed to the Circuit Court of Appeals for the Ninth Circuit (R. 61), which reversed the judgment of the district court, hold-

ing that since the Montana Enabling Act did not "clearly and specifically prohibit the United States from condemning the lands, we should not extend the prohibition to the United States" (R. 79). It held inapplicable the decision in *State ex rel. Galen* v. *District Court,* 42 Mont. 105 (1910), since it was not there decided that the Montana Enabling Act prevented the United States from condemning "school lands" R. 77, 79).

ARGUMENT

1. Petitioner contends that the circuit court of appeals should have held that since the authority for the instant condemnation was "the National Industrial Recovery Act, and the Emergency Relief Appropriation Act of 1935 (49 Stat. 115), and the Act of August 1, 1888 (25 Stat. 357), state owned school lands could not be acquired by the federal government without the consent of the State" (Pet. 13). As a basis for this argument, petitioner asserts that the Act of August 1, 1888, 25 Stat. 357 (Appendix, *infra,* p. 11), "vests no authority in any executive office" to condemn real estate, but only established a method for condemnation where authority was given, and that the National Industrial Recovery Act did not authorize condemnation of the instant project, the sole purpose of which it characterizes as providing a sanctuary for propagation and protection of migratory waterfowl (Pet. 13–14).

The contention is unsound. Section 202 of Title II of the National Industrial Recovery Act of

June 16, 1933, 48 Stat. 200 (Appendix, *infra*, pp. 11–12), provided that a comprehensive program of public works was to be prepared which should include, among other things:

> (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion * * *; (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public * * *.

Section 203 of the same Act (Appendix, *infra*, p. 12) authorized the construction or financing of such projects to remedy unemployment and the acquisition by purchase or the exercise of the power of eminent domain of property needed for any such project.

As the circuit court of appeals pointed out (R. 80), the lands are being taken for at least three purposes: (1) prevention of soil erosion; (2) propagation and protection of migratory wildlife; and (3) relief of unemployment (R. 4–5, 37). Agreement with petitioner's contention would, as a minimum, necessitate finding that the purposes were not as stated by the Administrator (see Statement, *supra*, p. 3). This the courts will not do. *Old Dominion Co.* v. *United States*, 269 U. S. 55, 66; *Oakland* v. *United States*, 124 F. (2d) 959, 964 (C. C. A. 9), certiorari denied, 316 U. S. 679; *United States* v. *243.22 Acres of Land*, 129 F.

(2d) 678, 683 (C. C. A. 2), certiorari denied *sub nom. Lambert* v. *United States,* 317 U. S. 698. The Administrator having authority to condemn, the mere fact that lands are owned by a state does not prevent their acquisition by the United States. *Oklahoma* v. *Guy F. Atkinson Company,* 313 U. S. 508, 534.

2. Petitioner further urges (Pet. 15–16) that the circuit court of appeals is bound by the decision of the Montana Supreme Court in *State ex rel. Galen* v. *District Court,* 42 Mont. 105 (1910), stating that case to hold that state-owned school lands are not subject to condemnation. However, as is pointed out by the circuit court of appeals (R. 77–79), the state court in that case did not decide that the Montana Enabling Act prevented the condemnation of school lands by the *United States.* It held that such lands could not be acquired by condemnation by persons seeking to construct a dam for the purpose of generating electricity for general sale. The Montana court in arriving at its conclusion reasoned that the *state* had agreed not to dispose of the land granted to it by the United States except in the manner prescribed in the grant. There is no holding, or even an intimation, that the federal Government, by the language of the Montana Enabling Act, placed a limitation upon itself in the exercise of any of its sovereign powers with respect to such lands.

Even if the point had been decided, however, the decision would not be binding on the federal courts, for those courts are not bound by state decisions interpreting the meaning and effect of a federal grant contained in a federal statute. *Borax Consolidated Ltd.* v. *Los Angeles,* 296 U. S. 10, 22. And, since the language used in the Montana Enabling Act[4] does not clearly and specifically prohibit the United States from condemning the lands, it should not be implied that the United States relinquished its sovereign power to exercise the right of eminent domain as to these lands. *Dubuque & Pacific R. Co.* v. *Litchfield,* 23 How. 66, 88; *Water Co.* v. *Knoxville,* 200 U. S. 22, 33; *United States* v. *Stevenson,* 215 U. S. 190, 197; *Louisiana Ry. & Nav. Co.* v. *New Orleans,* 235 U. S. 164, 175.

In every instance where the question has been passed upon, in states with similar Enabling Acts, the courts are in accord that the restriction there imposed has application only to a disposal by the state to private individuals, and that by these statutes the United States placed no limitation upon itself in the exercise of any of its sovereign powers with respect to such lands. *United States* v. *2715.98 Acres of Land, More or Less,* 44 F. Supp. 683, 684 (W. D. Wash.); *United States* v. *2902 Acres of Land, More or Less,* 11 Law Week

[4] "That all lands granted by this Act shall be disposed of only at public sale after advertising" (sec. 11, Appendix, *infra*, p. 13).

2750 (Wyo.), decided April 9, 1943. See *United States* v. *Forty Acres, More or Less, of Land, Etc.*, 24 F. Supp. 390 (Idaho).

Identical or substantially identical provisions relating to the disposal of school-land grants are to be found in the Enabling Acts of Arizona, Colorado, Idaho, New Mexico, North and South Dakota, Washington, and Wyoming.[5] To construe these provisions as precluding the acquisition of state school lands by federal condemnation proceedings would make it impossible for the United States to acquire large blocks of land which it needs for bombing ranges and other war purposes.

CONCLUSION

The decision of the court below is correct and presents no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1943.

[5] Act of March 3, 1875, sec. 14, 18 Stat. 474; Act of February 22, 1889, sec. 11, 25 Stat. 676; Act of July 3, 1890, sec. 5, 26 Stat. 215; Act of July 10, 1890, sec. 5, 26 Stat. 222; Act of June 20, 1910, sec. 10, 36 Stat. 557.

APPENDIX

Section 1 of the Act of August 1, 1888, 25 Stat. 357 (40 U. S. C. sec. 257) provides:

> That in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States circuit or district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney-General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice.

Sections 202 and 203 of Title II of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 200, provide in part:

> SEC. 202. The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: * * * (b) conservation and development of natural resources, including control, utilization, and purifica-

tion of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, and construction of river and harbor improvements and flood control * * * (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; * * *

SEC. 203. (a) With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public-works project included in the program prepared pursuant to section 202; * * * (3) to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project, * * *

Section 10 of the Montana Enabling Act of February 22, 1889, 25 Stat. 676, provides in part:

SEC. 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools * * *

Section 11 of the Montana Enabling Act of February 22, 1889, 25 Stat. 676, as amended by the Act of May 7, 1932, 47 Stat. 150, provides in part:

> SEC. 11. That all lands granted by this Act shall be disposed of only at public sale after advertising—tillable lands capable of producing agricultural crops for not less than $10 per acre and lands principally valuable for grazing purposes for not less than $5 per acre. Any of the said lands may be exchanged for other lands, public or private, of equal value and as near as may be of equal area, but if any of the said lands are exchanged with the United States such exchange shall be limited to surveyed, nonmineral, unreserved public lands of the United States within the State.
>
> The said lands may be leased under such regulations as the legislature may prescribe; but leases for grazing and agricultural purposes shall not be for a term longer than five years; mineral leases, including leases for exploration for oil and gas and the extraction thereof, for a term not longer than twenty years; and leases for development of hydroelectric power for a term not longer than fifty years.
>
> The State may also, upon such terms as it may prescribe, grant such easements or rights in any of the lands granted by this Act, as may be acquired in privately owned lands through proceedings in eminent domain: *Provided, however,* That none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of,

to be ascertained in such manner as may be provided by law, has been paid or safely secured to the State.

With the exception of the lands granted for public buildings, the proceeds from the sale and other permanent disposition of any of the said lands and from every part thereof, shall constitute permanent funds for the support and maintenance of the public schools and the various State institutions for which the lands have been granted. Rentals on leased lands, interest on deferred payments on lands sold, interest on funds arising from these lands, and all other actual income, shall be available for the maintenance and support of such schools and institutions. Any State may, however, in its discretion, add a portion of the annual income to the permanent funds.

The lands hereby granted shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States whether surveyed or unsurveyed, but shall be reserved for the purposes for which they have been granted.

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